v. *Wells*, 13 How. Pr. 385; *Fitridge* v. *Wells*, 4 Abb. Pr. 144; *Partridge* v. *Menck*, 2 Sandf. Ch. 622; *Craft* v. *Day*, 7 Beavan 84; *Crawshaw* v. *Thompson*, 4 Man. & Gr. 357; *Welch* v. *Knote*, 4 Kay & Johns. 747.

When the parties have the right to make the article, fraud must be shown on the part of the defendants or the injunction will be denied: *Burgess* v. *Burgess*, 17 Eng. Law and Eq. 260; *Farina* v. *Silverlock*, 39 Eng. Law and Eq. 514; Daniel's Chancery Practice 1754 and note 3.

The party claiming property in the trade-mark said to be violated must be the first to use it for that purpose: Upton on Trade-Marks 47.

The defendants will not be decreed to pay costs if they have not been guilty of fraud: *Millington* v. *Fox*, 3 Mylne & Craig 338; *Crawshaw* v. *Thompson*, 4 Man. & Gr. 357; *Partridge* v. *Menck*, 1 Howard's Appeal Cases 547; Upton on Trade-Marks 34 to 46 inclusive; Willard's Eq. Jur. 403, note 5; *Palmer* v. *Harris*, 8 American Law Reg. N. S. 137, and authorities cited by SHARSWOOD in delivering the opinion of the court: *Partridge* v. *Menck*, 2 Sandf. Ch. 622. *He that hath committed iniquity shall not have equity*, Francis' Maxims 5.

Advertising cannot make a trade-mark: Upton 179; Bouvier's Law Dictionary, title *Trade-Marks*.

The injunction will be denied if granting it will create a monopoly: *Amoskeag Manufacturing Co.* v. *Spear*, 2 Sandf. S. C. 606 and 607.

If the deception will not deceive the ordinary mass of purchasers the injunction will be denied: *Merrimac Manufacturing Co.* v. *Garner*, 4 E. D. Smith 387; *Amoskeag Manufacturing Co.* v. *Spear*, 2 Sandf. S. C. 607.

On the dissolution of a firm, all the former partners are entitled to use the trade-mark of the firm: *Coffin* v. *Brunton*, 5 McLean 256.

The protection of the court will not be given if the party seeking it is not entitled to the exclusive use of the trade-mark said to be violated: Upton 22 and 30 near the bottom.

All the parties in interest must be made parties to the suit: *McCall* v. *Sisher*, 2 Gil. 47; *Greenleaf* v. *Queen et al.*, 1 Pet. 138; *Van Epps* v. *Van Deusen*, 4 Paige 75; *Burnhams* v. *Burnhams*, 2 Barb. Ch. 407; *Shaver* v. *Brainard*, 29 Barb. 25.

Further as to trade-marks see *Filley* v. *Fassett*, 8 Am. Law Reg. N. S. 402, note and cases cited; *Hostetter* v. *Vowinkle*, 1 Dillon Cir. Ct. Rep. (in press).

C. W.

Supreme Court of Errors of Connecticut.

THOMAS S. SELLEW'S APPEAL FROM PROBATE.

A probate decree settling an executor's account is not conclusive evidence of his liability in money for the balance with which he is charged. That sum represents a balance of the estate undisposed of remaining for distribution, and the decree while it stands is conclusive evidence that he had in his hands those items of personal property.

But where a mistake has been made in the settlement of the account, and property with which the executor is charged proves in fact to have been lost or

destroyed when supposed to have been in existence or is subsequently taken from the executor by a paramount title when it was supposed to belong to the estate, the equity power of the court of probate is sufficient for the correction of the mistake, which correction may be made upon an application by the executor to the court for relief.

And where the same person is executor and trustee under a will, and after the settlement of his account as executor there is a loss of property without his fault, the court of probate may afford him relief in the settlement of his trustee account.

In such a case the trustee ought to charge himself with the whole amount which the court had ordered to be distributed to him and to credit himself with any loss or depreciation of the property, and the finding of the court of probate ought expressly or by necessary implication to determine the fact that he is entitled to those credits.

Where an executor was also a trustee under the same will and by the settlement of his account as executor was charged with a certain sum, and by a later settlement of his trustee account was charged with a less sum, the difference representing the loss or depreciation of property in his hands, it was held on an appeal from a probate decree settling the trustee account, that, as the record did not show precisely what the decree appealed from was, the mere fact of the difference between the two accounts was not a sufficient reason for reversing the decree.

A will gave property to a trustee for the benefit of a daughter of the testator, the income to be paid to her annually until she should reach the age of twenty-five years, at which time the property was to be conveyed to her absolutely, with a right on the part of the trustee in his discretion to convey all the property to her before reaching that age, and with a bequest over to other relatives of the testator in case the daughter should die without issue before the property was so conveyed to her. The daughter died without issue before arriving at the age of twenty-five years. Previous to her death the trustee had delivered to her a small portion of the trust estate: *Held*, that the trustee under the provision authorizing him to convey to her all the property in his discretion before she should reach the age of twenty-five, had a right to deliver to her such portion of the property as he thought best.

Where both parties to a suit move for a new trial or file motions in error, the party should go forward in the argument whose right it was to go forward in the court below.

APPEAL from three decrees of a probate court accepting and settling the account of William W. Wilcox, as trustee under the will of Anson R. Sellew. The reasons of appeal which were filed are stated in the opinion of this court.

The Superior Court reversed the decrees of the probate court appealed from, and both the appellant and the appellee moved for a new trial for errors in the rulings and decisions of the court, and also motions in error presenting the same points. The points made on both sides in these motions are sufficiently stated in the opinion.

When the case came up for argument in this court a question

was raised by the counsel as to which party should go forward, both having moved for a new trial and both having filed motions in error. The judges decided that the party that went forward below—the appellant—should go forward here, HINMAN, C. J., remarking that if a case stands so that any affirmative at all is left upon the plaintiff he always goes forward, whatever affirmatives may rest on the defendant.

Doolittle, for the appellant.

Wright, for the appellee.

BUTLER, J.—This is a complicated case as presented upon the record, both parties filing motions for a new trial, and both motions in error, but the real questions are few. In order to give reasons for our decision in the case intelligibly, it seems necessary to extract the material facts from the record.

Anson R. Sellew died testate, bequeathing his whole property in trust to his executors, for the benefit of certain relatives. Only one of the executors, Wilcox, accepted the trusts. The estate was duly settled, and the balance in the hands of the executor ascertained. Subsequently the trustee settled his trust account with the court of probate, upon three several occasions, and upon each the account was accepted and approved. The appellants appealed from the three several orders of the court of probate, accepting and approving the accounts of the trustee, and in the Superior Court filed their reasons of appeal, assigning four several errors in the action of that court.

The first error assigned is, that the trustee in presenting his trust account to the court of probate for settlement did not charge himself with the whole value of the property found to be in his hands upon the settlement of his executor's account, but for a sum $630.98 less than the amount found to be in his hands upon said settlement.

The second reason is, that the trustee sold a tract of real estate appraised at $2800, which was a part of said trust estate, and had not accounted for the proceeds.

The third reason is, that the trustee had paid over, improperly and without law or right, to Emma A. Sellew, a daughter of the

deceased, and one of the *cestui qui trusts*, a portion of the trust estate, to the injury of the appellant as residuary legatee.

The fourth reason is, that under an erroneous construction of a clause of the will, the trustee wrongfully retained the sum of $1000 for the use and benefit of Sarah O. Sellew, which sum should have been paid to the appellant as residuary legatee.

These questions, with the clauses of the will which relate to them, and the facts as found by the court bearing upon them, we will consider in their order.

The court below, in respect to the first assigned error, found the settlement and balance in the hands of the executor as alleged; that the amount credited in his first trustee account was $630.98 less, as alleged; that the error was propagated through the three trustee accounts which were settled and approved; and on that ground reversed the decrees.

Upon this point it appears from the appellee's motion for a new trial that he offered evidence to show that the $630.98 was not properly chargeable to him: 1st. Because a portion of the property his hands; 2d. That there was a depreciation in some of the charged to him in his executor's account never in fact came to personal property charged in the inventory of the estate before it came into his hands as trustee; 3d. That there was a depreciation in some of the personal property between the time when he settled his administration account and the time when he settled his trustee account; 4th. That furniture to the value of $141.23, embraced in the inventory, and charged to him in the executor's account, was claimed and taken by the widow, and his title thereto failed. The evidence so offered was rejected by the court, on the ground that the matter was *res adjudicata*, and in that we think the court misapprehended the law.

A decree of a court of probate, settling an executor's or administrator's account, is undoubtedly in the nature of a final judgment and conclusive of all matters involved in it. But it is not conclusive upon the executor or administrator of a *money demand* or liability, and the rule applicable to a judgment for a money demand cannot be applied to it. The executor or administrator as a trustee receives the estate of a deceased person, administers upon it according to law, and presents an account of his administration, and it is settled by the court. The balance

found on such settlement is a balance of the estate undisposed of remaining for distribution, and if the account has been settled in an orderly and proper manner the schedules will show with precision the items of property which compose that balance, and the decree is undoubtedly conclusive evidence that the executor or administrator has in his hands those items of personal property for distribution. There may be cases where the entire balance may consist of cash in the hands of the executor or administrator, but this case is not of such a character.

But suppose a mistake has been made in the settlement of the account, and an item of property which was supposed to be in existence was in fact lost or destroyed, and the fact was unknown to the executor or the court; must the executor lose it? Or suppose an item of property which the executor supposed was part of the estate, and which is charged to him in the administration account, is subsequently taken from him by paramount title; must the executor lose that? Certainly not. The equity power of the court of probate is ample for the correction of such mistakes, and for the protection of the executor.

If the order of distribution has not been made, he may apply to the court for relief, setting forth the facts, and the court may find them true upon the record, and make the order of distribution conform. So, at any subsequent stage of the proceedings, the application may be made and the relief granted.

Where, in a case like this, the entire estate is given to one person in trust, and where the trustee is a third person, and a part of the property has been taken from the executor by paramount title after distribution, the executor can have no relief against the claim of the trustee except by an application as executor, and an adjudication by the court of probate, for his protection. But where the executor and trustee are the same person, and the property is claimed and taken by paramount title subsequent to the settlement of the administration account, or subsequent to the distribution of the estate, we see no reason why an application should be made to the court of probate for relief by the trustee as executor, or why relief and protection may not be afforded him in the settlement of his trustee account.

So, in like manner, if there is a loss of property without fault on the part of the trustee, or a loss upon the sale of the property,

or any other occurrence in relation to it after distribution and before the settlement of his trustee account, we can conceive of no reason why the court of probate in the settlement of that account may not afford him all the relief to which he is equitably entitled, and we do not see how, admitting the conclusiveness of the administration account upon all the matters upon which that conclusiveness has any bearing, the court of probate could refuse to grant him relief.

Such being in our view the principles applicable in this case, we think it was competent for the court of probate to make an allowance in the trustee account for the failure of title to the furniture, or for any loss which had accrued from the sale of property by the trustee, or any other allowance to which he might be equitably entitled, and if in fact it did that and no more, and if the difference of $630.98 was thus accounted for, the decrees were not reversible simply because the amount found due in the settlement of the executor's account and the amount with which the trustee charged himself in his account did not conform.

The account of the trustee was undoubtedly incorrect in form. He should have charged himself with the whole amount which the court had ordered to be distributed to him and credited himself with any failure of title or loss or depreciation in the property decreed to be in his hands, and the finding of the court of probate upon the settling of the account should expressly or by necessary implication have determined the fact that he was entitled to those credits. Perhaps the decree was reversible for that reason, but there are not sufficient facts upon the record to show precisely what the decrees appealed from were. If the trustee was in fact entitled to credits to the amount of $630.98, as an offset to the balance found to be in his hands on the settlement of his executor's account, and that appears expressly or by necessary implication to have been found and allowed by the court in the settlement of the trustee account, the error in respect to form was not a fatal one.

The Superior Court was acting as an appellate court to determine the correctness of the trustee accounts, and was bound to give such credits as the probate court should have given, and received such evidence in relation to them as the probate court should have received.

For these reasons we think the Superior Court should have received the evidence offered by the appellee, and that because of its rejection a new trial must be granted.

It is not necessary that we should express an opinion upon the other questions raised, but it is proper under the circumstances that we should do so in respect to the third reason of appeal briefly.

The second issue raised by the reasons for appeal does not appear to have been pursued in the court below, and does not require notice.

The issue raised by the third reason for appeal was decided by the court below in favor of the appellee, and, we think, correctly. At the time that the transfer of the property to Emma was made the previous contingent trust was determined, and the trustee under the will had power to transfer to her absolutely the whole or any part of the estate at his discretion. The court has found no fraud or improper conduct on the part of the trustee, nor anything unreasonable in the exercise of his discretion, and certainly it is not our province to do it. In the determination of that issue by the court below there is no error.

In relation to the issue raised by the fourth reason of appeal, we express no opinion, except to advise the Superior Court, before a new trial shall be had, to cause Sarah O. Sellew to be made a party in the case, that she may have an opportunity to be heard in relation to her rights.

The foregoing opinion seems to us so extremely just and reasonable, and so practical, that we deem it too valuable a commentary upon the final responsibility of executors and trustees to be omitted from our collection of leading cases, although it is not fortified by any citation of authority; nor indeed could it have been, without embracing a large number of citations, since no single case, coming within the range of our observation, covers anything like the same number of points. It really covers, in point of principle, a large proportion of the points discussed by us in the two chapters in the third part of Wills on the Final Account and Distribution of Personal Estate, pp. 393–416, 421–433. And it affords us pleasure to be able to find our rules, there adopted, all confirmed, with the possible qualification that it seems to be intimated in the principal case, that where the executor is charged, in his final account, with specific personal property, which in point of fact had been lost before that time, without his fault, he may have the error corrected in the Probate Court on petition, and, as might be inferred from the general language used, without disturbing the former decree. For it is said by the learned judge that when the executor is also the trustee of the property, and receives it as such,

under the decree charging him with such specific estate as executor, that even where some of the property was not in existence at the time of the decree against the executor, the error may be corrected in settling the account of the trustee, and in the language of the learned judge, "we see no reason why an application should be made to the Court of Probate for relief by the trustee or executor, or why relief and protection may not be afforded him in the settlement of his trustee account."

This is most unquestionably sound as to all facts occurring after the property comes into his hands as trustee, and possibly as to facts first coming to his knowledge after the former decree, and affecting the question of title to such estate; but we should have supposed that in a case where the property had been destroyed before the passing of the former decree, the correction of the error would involve *an alteration of the former decree*, and would require some formal proceeding by the executor as such for that purpose. With this explanation the opinion is most unquestionably sound and wise, and the explanation is important only to preclude all possible misapprehension.

I. F. R.

Court of Appeals of Maryland.

PETER S. REYNOLDS *v.* THE MUTUAL FIRE INSURANCE CO.

Where the insured in a policy issued by a mutual insurance company is discharged by a bankrupt or insolvent law from all his debts and contracts, and among them his premium-note, the consideration for the policy fails, and the company is not liable to make good a subsequent loss.

The receipt by the company of interest upon his premium-note, after the filing of his petition in bankruptcy, but without *actual* notice thereof, is not a waiver of its right to treat the policy as at an end.

On October 5th 1858, Reynolds obtained insurance against fire upon certain buildings in Caroline county, in the Mutual Fire Insurance Company of Cecil County, for $2383, and at the same time, in consideration thereof, executed and delivered to the company his note, called a premium-note, for $108.89, to be paid "in whole or in such sums and at such times as the managers of the said company shall or may call for the same, according to the provisions of the act of incorporation and by-laws of the said company, and interest thereon at 6 per cent., to be paid annually in advance so long as the managers of the said company may find it necessary to call and receive the same." The record showed that Reynolds regularly paid the interest on said note, and the taxes assessed by the company, to August 1862 inclusive; and that, on December 25th 1860, he applied to the Circuit Court for